79-1870

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. _____

ADULT BOOKMART, INC.,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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THE STATE OF GEORGIA,

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PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on December 3, 1979.

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 152 Ga. App. 838, _____ S.E. 2d _____.

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on December 3, 1979. Copy of said decision is set forth in Appendix A hereto. An application for rehearing was timely filed and denied on December 20, 1979. Copy of said denial is set forth in Appendix B hereto. There-

after, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on January 16, 1980. Copy of said denial is set forth herein in Appendix C. Mr. Justice Powell granted an extension of time to and including May 14, 1980, within which to file this Petition. A copy of said order is set forth in Appendix D hereto. The Court's jurisdiction is invoked under Title 28 United States Code §1257(3).

QUESTIONS PRESENTED

I. Whether Georgia's obscene device statute Ga. Code §26-2101(c), as written and/or as applied to Petitioner is unconstitutional?

II. Whether jury instructions on scienter allowing a finding of "constructive knowledge" in an obscenity case are sufficient to meet the constitutional minimum standards of scienter set forth in *Hamling v. United States*, 418 U.S. 87 (1974)?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the First, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

In June 1, 1977, J. E. Segars, an investigator for the Solicitor of Fulton County, entered an adult bookstore known as Adult Bookmart, Inc. and purchased from Patrick Francis Simpson two magazines, one entitled "Toy Box Love—The Joy of Sex Devices, Volumn 1" and the other entitled "World of Love and Sex, Book 3." He also seized sixty (60) dildos, eight (8) artificial vaginas, four (4) vibrator kits and two (2) vacuum penis pumps.

On September 7, 1977, ADULT BOOKMART, INC. received notice from the Clerk of The State Court of Fulton County, Criminal Division, that an accusation had been filed against them.

The individual defendant, Patrick Francis Simpson, pled guilty and received a sentence of two (2) years to be served on probation and a $10,000.00 fine.

Prior to the trial herein, Petitioner filed a Motion to Dismiss, raising the constitutionality of Georgia Code Ann. §26-2101(c), a Motion to sever questioning the fairness of trying counts based on Georgia Code Ann. §26-2101 together with a count based on Georgia Code Ann. §26-2101(c) and a Motion To Supress predicated upon the ground that the officers had engaged in illegal mass seizures of novelty items without the authorization of a search warrant. Said Motions were overruled.

On June 14, 1978, the corporation, Adult Bookmart, Inc. was found guilty by a jury of six (6) people on all three counts as alleged in the accusation. The evidence had shown that the two magazines were distributed as part of one transaction, at the same date and at the same time on June 1, 1977. After the jury returned with their verdict, the Court sentenced the corporation to a $5,000.00 fine on each of three counts. Said fine totalled $15,000.00. Petitioner's counsel objected and moved that the Court impose the maximum fine of $10,000.00 because the two magazines were sold as part of the same transaction. Whereupon, the Court directed Petitioner's counsel to submit a brief in support of his argument and allowed the $15,000.00 fine to stand until said brief was submitted.

After briefs were submitted by both the Petitioner and the State, the Trial Court in an opinion rendered August

17, 1978 found that the sale of two magazines to the same person, at the same time and in the same place constituted but one punishable offense and reduced the fine to $10,000.00. A Motion for New Trial was promptly filed and subsequently overruled.

REASONS FOR GRANTING THE WRIT

I. Georgia's obscene device statute Georgia Code §26-2101(c), as written and/or as applied to Petitioner is unconstitutional.

II. The Jury instructions on the issue of *Scienter* failed to meet the minimum constitutional standards enunciated by this court in *Hamling v. United States*, 418 U.S. 87 (1974).

I. Petitioner filed a pre-trial motion attacking the constitutionality of Ga. Code Ann. §26-2101(c) (Acts 1968, pp. 1249, 1302; 1971, p. 344; 1975, p. 498). The Supreme Court of Georgia in *Sewell v. State*, 238 Ga. 495, 233 SE2d 187, appeal dismissed 435 U.S. 986 (1978) (see dissenting opinion by Justice Brennan) denied the attack made on the statute that it was vague and overbroad. The main ground is that it is an invasion of privacy to deny an adult or a married couple the right to possess or purchase a device that could be used to stimulate the genital organs all in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the U. S. Constitution.

The second ground raised in the motion is that such devices are not harmful per se, have a valid scientific and medical use, and therefore to make it a crime to possess such devices for personal consumption arbitrarily violates due process and the State of Georgia has no legitimate interest in regulating these types of devices since no harm

can come from them and they could not be considered offensive or obscene such as books, movies, or printed material, and therefore do not come under the *Miller v. California*, 413 U.S. 15 (1973), test of obscenity.

Petitioner's basic attack is that the public or adults ought to have the right to purchase or possess devices that could stimulate their sexual organs. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court struck down a state statute that made it criminal to use contraceptives. In finding the law unconstitutional, the Supreme Court held that it infringed upon a protected right of privacy. It infringed upon the right to marital privacy since its prohibition could be extended to the use of contraceptive devices by married couples.

The prohibition in this case infringes upon the same fundamental right. The statute is not limited to prohibiting the sale of such devices to minors or to unmarried persons. It merely sweeps all such devices together that could be used to stimulate the sexual organs, as criminal.

Secondly, there is no rational basis upon which the State may totally prohibit and impose criminal penalties for such devices.

The devices in the case at bar were not judged by the constitutionally accepted standards set out in *Miller*. The Court merely charged the jury that if they found the devices were designed or marketed as useful primarily for the stimulation of human genital organs they could convict the petitioner. (T-45). The three-part test in *Miller* was not considered by the jury.

In *Pierce v. Society of Sisters*, 268 U.S. 518, 536 (1925), the Supreme Court held an Oregon Mandatory public school attendance statute invalid on the grounds that the

statute had no reasonable relationship to some purpose within the competency of the state.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court overturned a state statute prohibiting the study of the German language. The court held that the statute was arbitrary or without reasonable relation to some purpose within the competency of the state to effect. 262 U.S. at 399-400.

Even if one assumes that the state has an interest in regulating such devices, there is absolutely no rational basis for the total prohibition of these types of devices. See also *Shelton v. Tucker*, 364 U.S. 479 (1960).

As was stated in *Griswold v. Connecticut*, 381 U.S. 479, at 497, in Justice Goldberg's concurring opinion:

> ". . . the law must be shown 'necessary and not merely rationally related to the accomplishment of a permissible state policy' *McLaughlin v. Florida*, 379 U.S. 187, 196."

The other constitutional grounds raised by the motions are urged, that is, the statute is overbroad, vague, and men of common sense and ordinary intelligence cannot determine what device may be considered illegal. See *Gooding v. Wilson*, 405 U.S. 518 (1972); *Grayned v. Rockford*, 408 U.S. 104 (1972).

Although this Court may not specify how a legislature is to meet legitimate social ends, it may prohibit the utilization of means that areunduly restrictive of individuals freedom. *Dean Milk v. Madison*, 340 U.S. 349 (1951).

All of the above argument proceeds on the premise that the state has some legitimate interest in regulating the uses to which sexual devices might be put. Petitioner

does not concede that the state has any such interest. But, even if it does, no possible rational basis can be imagined for total prohibition of such devices. No conceivable public interest can be served by prohibiting an individual from purchasing an item to further his own masturbation or to utilize in sexual activities with his spouse.

II. The second error raised involves the jury instructions on the issue of scienter in that it failed to meet the minimum constitutional standards enunciated by the United States Supreme Court in *Hamling v. United States*, 418 U.S. 87 (1974).

The jury which tried petitioner in an improper manner on the issue of *scienter* of knowledge. As to this issue, the jury was instructed as follows:

> "[T]he word 'knowing' as used in this statute shall be redeemed (sic) to be the actual or constructive knowledge of the obscene contents of the subject matter."
>
> "And a person or corporation that had constructive knowledge of the obscene contents if he or it has knowledge of such which would put a reasonable person or corporation on notice as to the suspect nature of the material." (T-40)

The instruction to return a verdict of guilty upon a finding of "constructive knowledge" is patently erroneous when the current constitutional minimum standards of *scienter* are considered. The most recent decision of the United States Supreme Court on the requirements of *scienter* is *Hamling v. United States*, 418 U.S. 87 (1974). There, the Court states:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instruction given by the district court

> in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the prosecution show that the defendant had knowledge of the contents of material he distributes, and that he knew the character and nature of the materials."

As the above decision clearly demonstrates, the Constitution requires a finding of actual rather than constructive knowledge. The requirement of actual knowledge is necessary to eliminate the chilling effect which will flow from any lesser standard. *Smith v. California*, 361 U.S. 147 (1959). As the Court stated in *Mishkin v. New York*, 383 U.S. 502 (1966):

> "The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent to the definition of obscenity."

The present constitutional minimum standard of *scienter* required actual knowledge. The Trial Court erroneously instructed the jury that a finding of guilty could be predicated upon constructive knowledge and therefore, Petitioner's conviction must be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

GLENN ZELL, *Attorney for Petitioner*

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CERTIFICATE OF SERVICE

I, GLENN ZELL, hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari on Hon. Hinson McAuliffe, Fulton County Solicitor, Fulton County State Court, 160 Pryor Street, S.W., Atlanta, Georgia 30303, by placing same in the U.S. Mail, properly addressed with adequate postage affixed.

This 14th day of May, 1980.

GLENN ZELL

Appendices

APPENDIX A

[December 3, 1979]

38030. ADULT BOOKMART, INC. v. THE STATE.
58031. STATE v. ADULT BOOKMART, INC.

UNDERWOOD, Judge.

Adult Bookmart, Inc. (hereafter appellant) is a corporation operating an adult book store in Fulton County. On June 1, 1977 John Segars, an investigator for the Solicitor of Fulton County, purchased a magazine entitled, "Toy Box Love—The Joy of Sex Devices, Volume 1" and a magazine entitled, "World of Love & Sex, Book Three", at the Adult Bookmart on Stewart Avenue in Atlanta. After purchasing the magazines he and another investigator with him seized several artificial sexual devises that were on display in a glass showcase. Appellant received notice from the Clerk of the State Court of Fulton County, Criminal Division, that an accusation had been filed against it, and thereafter was tried and convicted of three counts of violating Code Ann. § 26-2101 (a) by selling two magazines (one count each) and possessing obscene material with the intent to sell such material. Appellant was sentenced to a $5,000 fine on each count, but after briefs were submitted by both appellant and the state, the trial court found that the sale of the two magazines constituted only one offense. The court dismissed Count 2 and reduced the total amount of the fine by $5,000. The state has appealed that ruling and appellant Adult Bookmart, Inc. has appealed its conviction. Additionally, it has filed a motion to dismiss the state's appeal on the ground that it does not fall within one of the four instances set forth in Code Ann. § 6-1001 when the state can appeal in a criminal case.

1. With regard to the motion to dismiss the state's appeal, the trial court's action setting aside Count 2 of the accusation falls clearly within the provisions of Code Ann. § 6-1001 (a) which provides, in pertinent part: "An appeal may be taken by and on behalf of the State of Georgia from the superior courts and such other courts from which a direct appeal is authorized to the Court of Appeals of Georgia . . . in criminal cases in the following instances: (a) From an order . . . setting aside . . . any indictment or information, or any count thereof." The order of the court in this case stated "[t]he conviction and sentence on count two is vacated and set aside." This is exactly the situation covered in Code Ann. § 6-1001 (a) and, therefore, the state is authorized to appeal. Accordingly, the motion to dismiss the state's appeal is denied. Because of our disposition of the issue raised by the state on appeal, we need not discuss whether the state is seeking an advisory opinion and attempting to modify a sentence in violation of Code Ann. § 27-2506.1.

2. The contentions raised in each enumeration of error by appellant Adult Bookmart, Inc. have all been decided adversely to appellant by the Supreme Court. *Gornto v. State*, 227 Ga. 46, 47 (178 SE2d 894) (1970); *Sewell v. State*, 238 Ga. 495-496 (233 SE2d 187) (1977). Accordingly, the enumerations are without merit.

3. In the state's appeal it contends the trial court erred by ruling that the single sale of two obscene magazines made by one seller to one buyer, in one transaction at the same time and place, was only one offense. We disagree for the reasons set forth in our opinion in *State v. Maxwell*, 152 Ga. App. 77 (_____ SE2d _____) (1979). Additionally, Code Ann. § 26-2101 (a) provides, in pertinent part: "A person commits the offense of distributing

obscene material when he sells . . . to any person any obscene material of any description. . . ." This makes it abundantly clear that the gravamen of the particular offense under consideration is selling obscene material, and there was only one sale. It follows that if there was only one sale, there was only one offense. The state's argument that the sale was made to two investigators is not supported by the evidence. The state asked Mr. Segars "[d]id *you* purchase these two books at the same time?" and he answered "[y]es *I* did." (Emphasis added.) Thus, it is clear that Mr. Segars was the actual buyer of the magazines. Accordingly, the state's enumeration of error is without me.

Judgment affirmed. McMurray, P.J., and Banke, J., concur.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, December 20, 1979

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

58030 Adult Bookmart, Inc. v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, December 20, 1979

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, Clerk.

APPENDIX C

CLERK'S OFFICE,

SUPREME COURT OF GEORGIA

Atlanta, January 16, 1980

Dear Sir:

Case No. 35978. Adult Bookmart, Inc. v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-830

ADULT BOOKMART, INC.,

Petitioner

v.

GEORGIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 14, 1980.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 29
day of March, 1980.

APPENDIX E

CONSTITUTIONAL PROVISIONS

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . . abridging the freedom of speech, or the press . . . ."

2. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to any person within its jurisdiction the equal protection of the laws."